IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 530 of 1990

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAMBHUJI KALAJI

Versus

STATE OF GUJARAT

Appearance:

MR KIRIT I PATEL for the Appellant.

Mr.K.P.Rawal, ADDL. PUBLIC PROSECUTOR for the Respondent.

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision: 24/11/2004

ORAL JUDGEMENT

The appellant-original accused has preferred this appeal under section 374 of the Code of Criminal Procedure against the judgment and order dated 28th June, 1990 in Sessions Case No. 51 of 1987 passed by the learned Additional Sessions Judge, Ahmedabad

(Rural), convicting the appellant for the offence punishable under section 326 of the Indian Penal Code and awarding RI for two years and fine of Rs. 500/-, in default of payment of fine, further RI of of three moths.

2. Brief facts of the prosecution case are that on 8th July, 1986, the appellant-accused caused injuries on the vital parts of the body, that is, head to Khodaji Ambaram. The incident took place at village Bopal in Garba chowk. The appellant had a quarrel with his wife and the wife of the appellant was the relative of the injured Khodaji Ambaram. Therefore, the injured Khodaji Ambaram had scolded the appellant-accused and hence there was a hot discussion and altercation between the injured and the appellant and thereafter, the appellant caused injuries by a "Sambela" on the head of the injured Khodaji Ambaram, who had immediately fallen down and became unconscious. Thereafter, the injured was taken to the hospital. From the hospital also, the appellant's vardhi reveals that the injuries were caused by the appellant. There was a fracture at skull of the injured Khodaji Ambaram. Injured was hospitalised as an indoor patient from 8.7.1986 to 22.8.1986. Thereafter, he was discharged from the hospital, but again he was required to be admitted to the hospital for infection in the stitches on the head. The police had recorded statements of the eye witnesses and the FSL report also shows the blood marks of the injured Khodaji on the clothes and the presence of the blood on weapon "Sambela".

3. The learned counsel for the appellant mainly submitted that the incident had taken place at the spur of moment due to grave and sudden provocation and there is no pre-planned and well designed action on the part of the appellant and therefore, conviction for the offence punishable under section 326 of Indian Penal Code deserves to be quashed and set aside. It is also submitted by the learned counsel for the appellant that the eye witnesses, more particularly prosecution witness nos. 6, 7, 17 and 18 are interested and partisan witnesses and therefore, they are not reliable witnesses. It is also submitted by the learned counsel for the appellant that the weapon used is not a deadly weapon and therefore, at the most, the offence would fall either under section 325 or under section 308 of the Indian Penal Code and hence, benefit of Probation of Offenders Act, 1958 should be extended to the appellant and the order of conviction and sentence passed by the trial court deserves to be quashed and set aside and the appellant deserves to be acquitted.

It is also submitted by the learned counsel for the appellant that the incident had taken at night and therefore, there are all chances that there is mis-identity of the appellant by the witnesses.

4. Learned Additional Public Prosecutor Mr. Rawal submitted that the incident had taken place in Garba chowk in village Bopal and before actual injuries were caused by the appellant to the victim, there was an altercation between the injured and the appellant. This incident was witnessed by eye witnesses. The weapon "Sambela" was used to cause injury on the vital part of the body of the victim Khodaji. The injury was caused on the head and there was a fracture on the skull of the victim Khodaji. There was a clw of the size of 6 cm x 1 cm bone deep on the left front side of parietal bone. As per the certificate exh. 28 issued by the Medical Officer, immediately on the spot, the victim Khodaji became unconscious and he remained unconscious even when he was treated at the hospital by the doctor. It is also submitted by the learned APP Mr. Rawal that as per the eye witnesses, mainly p.w. no. 7 Galbaji Becharji exh. 18, the appellant had caused injuries to the victim on the vital part of the body. Thereafter, the appellant had run away from the scene of offence. The incident had taken place on 9th July, 1986 but the appellant surrendered himself after few days to the police station. Thus, he was not available after the offence was registered. It is also submitted by the learned APP that there are no omissions or contradictions in the depositions of the witnesses, especially p.w. nos. 6, 7, 8, 9 and 10 (Dr. Bimal Goswami) at exhs. 17, 18, 19, 20 and 25 respectively. On the contrary, there is a corroboration between ocular evidence and the documents, namely telephone vardhi recorded by the police on the basis of the telephone call received from the hospital, FSL report at exhs. 33, 34 and 35 coupled with the panchnama which is at exh. 12 and therefore, conviction awarded by the trial court is true, correct and in consonance with facts and law and hence the sentence awarded by the trial court may not be altered by this Court.

5. I have perused the record and proceedings of the trial court. Heard the learned counsel for the appellant as well as learned APP Mr. K.P.Rawal for the respondent State. Looking to the facts and circumstances of the case, deposition of witnesses and documents on record, in my view, the conviction and sentence ordered by the trial court and the quantum of sentence awarded by the trial court does not deserve any interference by this

Court, mainly for the following facts and reasons.

(i) The incident had taken place at Garba chowk in village Bopal and was witnessed by witnesses. Initially, there was an altercation between victim Khodaji Ambaram and the appellant. The prosecution witnesses, especially p.w. no. 7 has narrated the incident without omissions and contradictions.

(ii) There is no inconsistency right from the telephone vardhi recorded by the police at exh 21 which implicates the appellant. In the said telephone vardhi, the name of the accused, that is, the present appellant is referred. The weapon "Sambela" is referred, where and on which part of the body of the victim, the appellant has caused injuries, has also been referred alongwith the date and time.

(iii) As per the injury certificate, there was an injury on the head of the victim. The injury was 6 cm x 1 cm bone deep. There was a skull depressed and the fracture on the left front parietal bone and as per prosecution witness no.10, i.e. Dr. Bimal Goswami, who has deposed at exh. 25, that the said injury was capable of being caused by the weapon "Sambela" and was sufficient to cause death of the victim had the victim not treated immediately. Without any omissions and contradictions, a clear deposition has been given by Dr. Bimal Goswami which is corroborating to prosecution witness nos. 6 and 7, that is, deposition of witness Bapuji Mangaji and Galbaji Becharji at exhs. 17 and 18 respectively.

(iv) Police witnesses have also been examined who are referring recording of telephone vardhi, statements of witnesses, drawing of panchnama, filing of the charge-sheet etc. There is no omission or contradiction in the deposition of police witnesses, especially p.w. nos. 9, 11 and 12 and they are also corroborating the facts stated by the eye witnesses and lead to the accusation of causing injuries on the head of the victim by the appellant. The panchnama of the recovery of the Muddamal article (Sambela) has been proved by the deposition of police witness.

(v) FSL report of weapon "Sambela" as well as clothes of the victim suggest that there were blood stains on the clothes of the victim. Looking to serological analysis at exh.35, the same is corroborative to the version stated by the

prosecution witnesses.

(vii) An attempt has been made to point out by the learned counsel for the appellant that one of the prosecution witnesses had preferred cancellation of bail application before the trial court and therefore, the prosecution witness no. 7 Galbaji Becharji exh. 18 is an interested or partisan witness and hence he is not a reliable witness. Looking to the facts on record, p.w. 7 Galbaji Becharji is a natural eye witness who was present at Garba chowk in village Bopal near pan shop which is the scene of incident and has narrated in his deposition at exh. 18 without any omission or contradiction and his version has been corroborated by p.w. 6 Bapuji Mangaji exh. 17, by p.w. 8 Ramtuji Sedhaji exh. 19. The victim had become unconscious on the spot because of head injury and was taken to governmental hospital, i.e. V.S.Hospital at Ahmedabad and whatever has been stated by p.w. 7 Galbaji Becharji, especially the fact that the present appellant has caused head injury to the victim by weapon "Sambela" has also been reflected in telephone vardhi from the hospital to the police station. Even the version of p.w. 7 at exh. 18 has been corroborated by the deposition of other witnesses and by FSL report.

(viii) Dr. Bimal Goswami, p.w.10 at exh. 25 reveals the fact that there was a fracture on the skull of the victim and bone had broken and had entered into brain. The patient was hospitalised from 8th July, 1986 to 22nd August, 1986. He was not capable of doing any work even after discharge from the hospital for two to three months. It is also deposed by the doctor in his deposition that if the patient would not have been treated immediately, he would have died 100% and the injury can be caused by the muddamal article "Sambela". There is no material omission or contradiction in his deposition. This is his corroboration to the case presented by the prosecution against the appellant.

(ix) So far as the argument about misidentity of the appellant-accused by the witnesses is concerned, as per the prosecution witnesses, there are eye witnesses who have seen the incident. There are shops near the place of incident. The prosecution witnesses are knowing the accused appellant. It is also the prosecution version that some altercation was going on between the appellant and the victim. Therefore, they had an

occasion to see the accused and hear their altercation. Thus, there is an identity by the voice also. The prosecution witness no. 2 Pashaji Ataji at exh. 9 has clearly deposed that the appellant and the victim had hot exchange of words. The present appellant, during the course of hot discussion between victim and the appellant, caused injuries to the victim and had immediately run away. He has also narrated that there are shops and houses at Garba chowk and he was going to purchase tobacco from the shop. This is how he has seen the appellant causing head injuries to the victim. There are also houses nearby Garba chowk. It is also referred in the panchnama of the scene of offence at exh. 10 that there was an electricity pole at Garba chowk. Similarly, other witnesses, namely witness no. 7 at exh. 18 has also seen the incident and has narrated as to how the appellant has caused head injuries to the victim. As a cumulative effect of the depositions of witnesses and scene of offence panchnama, coupled with the fact that there is no suggestion even in cross-examination of any of the witnesses, as to insufficiency of light for proper identification of the appellant, leaves no reason for this Court to disbelieve the true and correct identification of the appellant. Thus, identification of the appellant is established as per the version of the prosecution witnesses alongwith the scene of offence panchnama.

(xi) The prosecution witnesses, especially, p.w.6 and p.w. 7 i.e. Bapuji Mangaji and Galbaji Becharji at exh. 17 and exh. 18 respectively are the natural witnesses. P.W. 6 and p.w.7 are eye witnesses whose presence at scene of offence is natural and have narrated incident with all accuracy and their depositions have enough corroborations. Therefore, p.w. 6 and p.w. 7 are trustworthy witnesses.

(xii) The weapon "sambela" was having an iron ring. The weapon was of three and half feet length and capable of being held from middle. This weapon was struck on the skull causing depression of skull and fracture on the parietal region. As per Doctor's evidence, the nature of injury was such that if immediate treatment would not have been given, the patient would have died 100%. Therefore, looking to the nature of weapon, my my opinion, the weapon used was a deadly weapon.

(xi) The learned counsel for the appellant submits

that still more number of witnesses were available to the prosecution and they could have been examined by the prosecution, other than those who are examined and therefore, the case of the prosecution is not believable. It is suffice to say at this stage that if eye witnesses are reliable and trustworthy, there is no need to examine multiple witnesses and hence the contention raised by the learned counsel for the appellant is devoid of any merit.

6. Looking to the cumulative effect of the aforesaid circumstances and reasons, the order passed by the trial court convicting the appellant under section 326 is correct, legal and in accordance with law and the sentence awarded by the trial court is in consonance with the facts and law. There is no justifiable reason for this Court to take any deviation either from the conviction or for the quantum of sentence awarded to the appellant.

7. In view of the above discussion, there is no substance in the present appeal. Hence, the appeal is dismissed. The bail bonds granted to the appellant-accused are hereby cancelled. The trial court is directed to take immediate steps to secure the presence of the appellant-accused and send him to judicial custody at the earliest.

8. As per the submission of the learned APP K.P.Rawal, the appellant-accused has remained in jail only for three days and set off has been given for two days. Thus, practically, no sentence has ever been undergone by the appellant.

(D.N.Patel,J)

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